No. 15,117

United States Court of Appeals

For the Ninth Circuit

NEW & USED AUTO SALES, INC., a corporation,
Appellant,

vs.

BERNARD L. HANSEN, also known as Barney Hansen, and SUZANNE HANSEN,
Appellees.

BRIEF OF APPELLEES.

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BRIEF OF APPELLEES.

I.

JURISDICTION AND PLEADINGS.

Appellees concur in the statement of jurisdiction in Appellant's brief pages one through three.

II.

STATEMENT OF THE CASE.

Although a statement of the case is contained in Appellant's brief (pages three through nine) it is considered necessary to embody in this brief a state-

ment of the case which more clearly reflects the facts upon which the judgment was based.

On the 31st day of December, 1954, the parties entered into an automobile conditional sales contract (R-3) and Two Thousand Four Hundred Twenty-nine Dollars Forty Cents ($2,429.40) having been paid on the contract (R-7) Appellant filed suit to repossess six days after default in the December 3, 1955 monthly payment (R-4, 5), at the same time terminating the escrow payment arrangement at the bank (R-7). On December 16, 1955, Appellees attempted to pay Appellant, requesting a statement of the delinquency, plus costs of retaking, keeping and storing but instead, on December 17, 1955, were given a statement for the entire remaining balance. (R-7, 9).

On December 19, 1955, Appellees tendered payment of the delinquency plus costs of retaking, keeping and storing, but Appellant refused to accept payment and return the car (R-10, 11, 13, 15). Upon Appellant's refusal to allow payment of the delinquency or furnish a correct statement of costs, and upon Appellant's retention of the automobile, a statutory claim for relief accrued to Appellees.

To force return of the automobile and continuation of the contract, on December 20, 1955, a motion for summary judgment seeking statutory damages and continuation of the contract was made on behalf of Appellees which motion was argued on December 23, 1955 (R-5).

The argument on the motion dealt with the acceleration of a conditional sales contract upon de-

fault. Following argument of the motion on December 23, 1955, Appellant served a second statement on attorney for the Appellees, and further presentation was made on December 24, 1955 (R-20, 21). No objection was ever made to the length of notice on this motion during these arguments.

On January 6, 1956, the Court rendered oral decision on the motion (R-20, 21) indicating that the accuracy of the costs of retaking, keeping and storing contained in Appellant's statements was still open to question (R-21). Proposed findings of fact and conclusions of law and judgment were filed January 11, 1956 (R-28) and objections were filed the same date (R-22).

Following the hearing on these objections the Court ordered Appellant to return the car together with one-fourth of the moneys theretofore paid on the contract, signing the findings of fact, conclusions of law and judgment (R-28, 30-31).

A motion for a new trial, to set aside judgment and to strike was made on February 2, 1956, and argument having been had was denied (R-34-35). Notice of appeal was given and this appeal followed.

The question presented to the lower Court in connection with the motion for summary judgment on December 23, 1955, was whether an acceleration clause in a conditional sales contract is enforceable against a buyer in default.

After this motion had been made and argued, Appellant attempted to create a new fact situation by

serving a second statement (R-17, 18) and numerous affidavits in connection with additional Court appearances as set forth in the transcript of record from page seventeen (17) through thirty-seven (37).

The motion was actually decided by the lower Court on the first sixteen and one-half (16½) pages of the record.

III.

ARGUMENT.

A. SPECIFICATIONS OF ERROR NOS. 1, 2, 3, AND 4.

1. THAT THE LOWER COURT ERRED IN BASING ITS JUDGMENT HEREIN UPON A MATERIAL QUESTION OF FACT WHICH IS IN DISPUTE.
2. THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT THAT ARE CONTRARY TO THE RECORD.
3. THAT THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT BASED SOLELY UPON THE AFFIDAVITS OF DEFENDANTS, APPELLEES HEREIN.
4. THAT SEVERAL GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE AND HAVE NEVER BEEN ADMITTED BY APPELLANT, BUT, ON THE CONTRARY, SAID ISSUES HAVE BEEN DENIED BY APPELLANT AND EVIDENCE OFFERED.

Appellant (Appellant's brief—9) states that this appeal turns on Paragraphs IV and V (R-27) of the findings of fact. These first four specifications of error, made in very general terms, are grouped together here for the purposes of argument.

Concerning finding of fact IV (R-27), Appellant first argues that the lower Court erred in finding:

> "That Plaintiff failed to furnish Defendants a written statement of the amount due under the

conditional sales contract and the expenses of retaking and keeping and storing the car . . ." (R-27).

Appellant takes this position because, after first giving only a general oral statement on the 16th day of December, 1955 (R-8), and then giving an unlawful written statement demanding the entire contract balance on the 17th day of December, 1955 (R-9), and after a motion for summary judgment had been made, and argued, and the Court orally indicated a disposition to rule in favor of Appellees (R-42), then Appellant delivered a second written statement (R-17, 18) which they now contend satisfied the statutes for the purposes of the motion.

The statutory claim for relief accrued when Appellant refused to allow Appellees to continue in the performance of their contract and forced them to secure legal assistance to protect their rights, Appellant meanwhile insisting on a total forfeiture. Appellant argues as though the second, subsequent statement excused all previous disregard of Appellees' rights.

Appellant did not give notice of intention to retake the automobile (R-7).

Section 29-2-18, A.C.L.A. 1949 (Sec. 18 of the Uniform Conditional Sales Act) reads as follows:

"Redemption by Buyer: Seller to Furnish Statement of Sum Due.

If the seller does not give notice of intention to retake described in Section 17 (Sec. 29-2-17 herein), he shall retain the goods for ten days after

the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred. Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer Ten Dollars ($10.00) and also be liable to him for all damages suffered because of such failure. If the goods are perishable so that retention for ten days as herein prescribed would result in their destruction or substantial injury, the provisions of this section shall not apply, and the seller may resell the goods immediately upon their retaking. The provisions of this section requiring the retention of goods within the state during the period allowed for retention shall not apply to the goods described in Sec. 8 (Sec. 29-2-8 herein)."

Sec. 29-2-25 A.C.L.A. 1949 (Sec. 25 Uniform Conditional Sales Act) reads as follows:

> "Sec. 29-2-25. Recovery of Damages by Buyer After Retaking Goods. If the seller fails to comply with the provisions of Sec. 18, 19, 20, 21 and 23 (Sec. 29-2-18-29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest."

Section 29-2-26 A.C.L.A. 1949 (Sec. 26 Uniform Conditional Sales Act) provides in part as follows:

> "Sec. 29-2-26. Waiver of Statutory Provisions: Effect of Provision for Recision. No act or agreement of the buyer before or at the time of the making of the contract, nor any agreement of, or statement by, the buyer in such contract, shall constitute a valid waiver of the provisions of Section 18, 19, 20, 21 and 25 (Sec. 29-2-18-29-2-21, 29-2-25 herein) . . ."

Appellees served a written demand upon Appellant for a statement of the sum due under the contract and the expense of retaking, keeping and storage (R-7, 8). Appellant furnished a written statement, but it was not a written statement of the "sum due under the contract and the expense of retaking, keeping and storage", being instead a statement of the net payoff of the principal sum plus various costs (R-11, 12). Appellees, within ten days of the retaking, tendered the amount due under the contract at the time of retaking and interest, and the expenses of retaking, keeping and storage (R-6-14). The lower Court re-

fused to be mislead by Appellant's later attempt to alter the fact situation, existing at the time the motion for summary judgment was filed; by service of a second written statement after the motion had been argued. The Finding of Fact was exactly correct because Appellant failed to furnish the statement required by the statute.

The remaining portion of Finding of Fact IV relating to the tender of the sum due under the contract and the expense of retaking, keeping and storage is specifically admitted in Appellant's affidavit dated December 21, 1955 (R-15), which affidavit was made and filed when Appellant was still attempting to retain the car by virtue of an acceleration clause in the conditional sales contract. The lower Court was personally aware of the time sequence of these statements because of the repeated Court appearances.

Concerning Finding of Fact V (R-27) setting forth the sum paid in on the contract, the lower Court considered Appellant's colored recital concerning a check which was the subject of a previous collection action decided in favor of Appellees and appealed by Appellant from the Justice Court for the Anchorage Precinct (improperly designated "Commissioner's Court") to the District Court for the District of Alaska, Third Division, case no. A-11,713. The lower Court refused to allow Appellant to interject that unsuccessful lawsuit into this one on the basis of "information and belief" of Appellant's attorney (R-24, 25).

Rule 56 (e) of the Federal Rules of Civil Procedure provides:

> "Rule 56. Summary Judgment. (e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In its complaint, Appellant makes no mention of this now denominated "delinquency". In Appellant's affidavit (R-16) mention is made in highly emotional language of two checks and previous attempted repossessions, but it is clear that the check discussed in Appellant's brief was not a down payment check. Appellant failed to designate that part of its complaint pleaded as Exhibit "A" which was the conditional sales contract containing an acknowledgment of receipt of down payment, and the complete acceleration clause which was the basis of the motion and arguments in the lower Court.

The lower Court had before it the sworn pleadings showing the delinquency to be $120.84 and the conditional sales contract as well as the affidavit of Appellee Hansen (R-7) and Appellant's first statement (R-13) from which to compute the statutory damages. No question of fact was ever raised concerning the total amount paid on the contract by Appellees, and in the multitude of affidavits signed by Appellant and Appellant's attorney, the fact stated in Appellee's affidavit (R-7) that Two Thousand Four Hundred

Twenty-nine Dollars Forty Cents ($2,429.40) had been paid on the contract was never controverted.

Point 4 of Appellant's specifications is apparently directed toward what are claimed to be the costs of retaking, keeping and storing as contemplated by Sec. 29-2-18 A.C.L.A. 1949 (supra). Appellant feels the amount was in dispute.

The complaint sets the sum of Fifty Dollars ($50.00) as the "cost of recovering said personal property from defendants" (R-4), and the allegation was admitted by the motion. The first written statement rendered, which prompted this motion, listed the claimed costs (R-12) as Eighty-one Dollars Sixty Cents ($81.60). The second written statement (R-18) contained a new item of costs and a changed item for a total of Ninety-three Dollars Eighty-four Cents ($93.84). Orally, Appellant demanded (R-10) Two Hundred Seven Dollars Forty-four Cents ($207.44) as the total of the delinquent payment plus costs which would place the costs at Eighty-six Dollars Sixty Cents ($86.60). In its brief, Appellant claims that although the record doesn't show it, the costs were actually more than any of these. The record does show that the Appellees tendered Two Hundred Seven Dollars Forty-four Cents ($207.44) (R-11) in cash which totalled the delinquency plus costs of retaking, keeping and storage claimed at that particular time by Appellant, and that the tender was refused.

Sec. 29-2-18 A.C.L.A. 1949 (supra) required Appellant to furnish to Appellees a written statement of

the sum due under the contract and the expense of retaking, keeping and storage, and it would appear that any requirement of accuracy in this statement is for the benefit of Appellees, to protect them from overcharges, not for the protection of Appellant who is dominus of the statement.

According to Appellant's brief (Appellant's brief page 21), a full, correct statement has never yet been given. Whether any of the claims made were correct is immaterial because Appellees tendered payment of the expenses as claimed, and tender was refused. The actual correctness of any of these statements will remain immaterial since Appellant, in the face of the order of the lower Court while appealing this matter sold the vehicle to itself at a "repossession sale" on March 26, 1956 following posting of notices by James K. Tallman.

The lower Court found, in Finding of Fact IV (R-27) that "Defendants duly tendered to plaintiff a sum equal to or exceeding the amount due under the contract and the expenses of retaking, keeping and storing the automobile, which tender was refused."

The tender was in the amount of Two Hundred Seven Dollars Forty-four Cents ($207.44) (R-11). The complaint gave the cost of recovery as Fifty Dollars ($50.00) which added to the delinquency totals One Hundred Seventy Dollars Eighty-four Cents ($170.84). The first written statement listed expenses which, added to the delinquent installment, would total Two Hundred Two Dollars Forty-four Cents ($202.44). The oral claim for expenses (R-10)

was in the amount of Two Hundred Seven Dollars Forty-four Cents ($207.44). Thus the lower Court was correct in its findings.

The motion for summary judgment was made at this point and the lower Court being appraised by Appellant's affidavit (R-15) that "affiant admits that the defendant, Bernard Hansen, tendered certain payments as indicated in his affidavit of December 20, 1955, on file herein . . .", the lower Court found the facts as of the time of the motion. Appellees' subsequent claims could not alter the fact situation.

B. THAT THE LOWER COURT ERRED IN RENDERING A DECISION ON THE MOTION FOR SUMMARY JUDGMENT BEFORE COUNSEL FOR PLAINTIFF, APPELLANT HEREIN, HAD PRESENTED ARGUMENT.

Appellees' specification No. 6 is based on two misleading arguments. The first part relies on the printing of a very short excerpt from the transcript of proceeding of the argument had on December 23, 1955 (R-42, 43). Appellant attempts to lead this Court into believing that Appellant was never accorded time to argue, and does this by printing a request by counsel for further argument after the Court had already been satisfied at length.

Although Appellant designated the record of the hearing on findings of fact, conclusions of law and judgment (R-30) and the hearing on the motion for new trial (R-33) and the hearing on the motion to fix supersedeas bond (R-39) and the hearing on justification of bondsmen (R-40, 41), Appellant some-

how neglected to designate the record of the hearing on the motion for summary judgment which resulted in the minute order rendering the oral decision (R-20, 21). If this had been printed, counsel could not claim that argument was not allowed.

Even the record as printed only shows that counsel wanted to be heard further, but the lower Court, having accorded the privilege of oral argument, did not desire to spend more time on what was already clear.

The second point in support of Appellant's theory that they were never allowed to offer evidence and argument, is to the effect that after the hearing on December 23, 1955, "no further argument was ever held before the Court indicated that he had granted summary judgment." (Appellant's brief page 20). This would seem to be misleading inasmuch as the minute order states that the arguments were also had on the 24th day of December, 1955. (R-20). At that time Appellant had filed its second written statement (R-17, 18). Informal conferences had by the attorneys with the Court in chambers in an attempt to settle the matter are not a part of this record.

C. THAT THE MOTION FOR SUMMARY JUDGMENT WAS SET FOR HEARING THREE DAYS AFTER THE FILING AND SERVICE OF SAID MOTION, CONTRARY TO RULE 56 (c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND THE LOWER COURT ERRED IN HEARING SAID MOTION THREE DAYS AFTER SERVICE UPON APPELLANT.

As pointed out in Appellant's brief (Appellant's brief—22) Rule 56 (c) of the Federal Rules provides that a motion for summary judgment shall be served

at least ten days before the time fixed for the hearing. In this case, only three days' notice was given.

Appellant, without objection, argued the motion and introduced affidavits on the 23rd day of December, 1955, and on the 24th day of December, 1955. Appellant further argued objections to the proposed findings of fact and conclusions of law and proposed judgment, which was a rehash of the entire proceedings (R-21-25) and once again argued a motion for a new trial and to set aside judgment and to strike, reviewing the entire history of the case (R-31-35), but never in the numerous Court appearances did Appellant object to the length of notice.

Under the circumstances, Appellant should be found to have waived any objection available.

D. THAT THE MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY BEFORE THE COURT SINCE THE MOTION FOR SUMMARY JUDGMENT WAS NOT RESPONSIVE TO THE ALLEGATIONS OF THE COMPLAINT.

No authority is cited by Appellant in support of this specification. So far as the allegations of the complaint were concerned, they were admitted by the motion. The entire admitted complaint, together with Sec. 29-2-18, and 29-2-26 A.C.L.A. 1949 (supra) taken with the affidavit of Hansen (R-6-12) and the affidavit of Blanche Avila (R-13, 14) set the statutory damages.

Appellant, on default of the monthly installment payment was entitled to possession of the vehicle, and the Appellees, upon tendering payment were entitled

to have it back and to continue in the performance of the contract.

Appellant in Paragraph 6 of the complaint (R-4) alleged the cost of the recovery to be Fifty Dollars ($50.00). This was admitted by Appellees, although denied and revised steadily upward by Appellant on numerous subsequent occasions. The Court in its minute order (R-20-21) requested Appellant to settle on one figure for the costs of retaking, keeping and storing, having at that time considered Appellant's claim for Fifty Dollars ($50.00), Eighty-one Dollars Sixty Cents ($81.60), Eighty-six Dollars Sixty Cents ($86.60) and Ninety-three Dollars Eighty-four Cents ($93.84). Appellant in subsequent Court appearances, including its objections to the proposed findings and judgment never complied with the lower Court's request to submit an accurate statement until after the motion for a new trial was denied on February 3, 1956 (R-35), when Appellant selected one set of costs by finally filing a fifth claim, which was served and filed together with a notice of appeal (R-36-39). Appellees tendered the highest expenses claimed up to the time of the tender (R-10), which exceeded the allegation in the complaint. Appellant claimed the various sums for expenses, none of which were denied by Appellees; although in the motion the Appellees admitted the allegations of the complaint, the lower Court because of Appellant's repeated changes of position and failure to submit a final correct statement, simply refused to grant any relief at all to Appellant for expenses of repossession.

E. THAT THE LOWER COURT ERRED IN REFUSING TO GIVE EFFECT TO AN ACCELERATION CLAUSE IN THE CONDITIONAL SALES CONTRACT AND HOLDING THAT ACCELERATION CLAUSES ARE INVALID.

Appellant failed to designate material portions of the record including the complete conditional sales contract. The case in the lower Court turned upon the construction and effect of the acceleration provisions of this document. Appellant declared "The entire principal sum remaining unpaid on your conditional sales contract due and payable . . ." (R-12). No note was made a part of the record in this case. Appellant's arguments on this specification do not deal with acceleration under the Uniform Conditional Sales Act provisions in effect in Alaska, Sections 29-2-1 through 29-2-30 A.C.L.A. (1949).

Appellees throughout this proceeding sought only the recognition of their rights as guaranteed by Sections 29-2-18, 29-2-25 and 29-2-26 A.C.L.A. (1949) (supra), whereas Appellant determined upon a forfeiture by consistently demanding sums of money exceeding the funds available to Appellees.

Appellees requested a written statement (R-7, 8). Appellant responded claiming the entire remaining balance (R-11, 12). Appellees, at the office of Appellant's attorney and in the attorney's presence, tendered the sum subsequently claimed (R-10) but the tender was refused and a persistent attempt to claim the entire remaining balance was made (R-14).

To allow an acceleration would be to promote forfeitures undermining the purpose of the Uniform Conditional Sales Act. Annotations on this point are

found in 83 A.L.R. 976 and 99 A.L.R. 1301. A case most in point is *Clark v. Tri-State Discount Co.* (1934) 151 Misc 679, 271 NYS 779, where an attempted acceleration was specifically disallowed.

This action was brought on contract, seeking possession of the security, not on the note which apparently only served as additional evidence of the debt. Appellant's argument that the Court should have allowed an acceleration of the note is not in point. But even if it were a suit on the note for a money judgment only, the result would still be forfeiture and prohibited under the reasoning of *Clark v. Tri-State Discount Co.* (supra).

CONCLUSION.

No material questions of fact were in dispute and the lower Court's Findings of Fact are supported by the entire record; the lower Court duly entered judgment following arguments on the motion for summary judgment, and properly refused to give effect to the acceleration clause in the conditional sales contract.

Dated, Anchorage, Alaska,
February 20, 1957.

Respectfully submitted,
BURTON C. BISS,
Attorney for Appellees.